No. 91-990

In The

Supreme Court of the United States

October Term, 1991

DALE FARRAR and PAT SMITH, as Co-Administrators of the Estate of Joseph D. Farrar, Deceased,

Petitioners,

versus

WILLIAM P. HOBBY, JR.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT

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QUESTION PRESENTED

When the sole object of a suit is to recover money damages, is a plaintiff the "prevailing party" within the meaning of 42 U.S.C. § 1988 and this Court's decision in *Garland** when the jury determines that the plaintiff was not injured by the defendant and is entitled to no damages, when the court's judgment neither requires nor produces any change in state policy or practices, and when the sole "relief" awarded plaintiff is an appellate court's holding that plaintiff should recover nominal damages not exceeding $1.00?

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* *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 489 U.S. 782 (1989).

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STATEMENT OF THE CASE

The district judge in this case, who was not the presiding judge at trial, awarded plaintiffs' counsel every penny of the $280,000.00 fees which they claimed, as well as $27,932.00 in costs and $9,730.00 in prejudgment interest. This award was premised on his holding that plaintiffs were "prevailing parties" within the meaning of 42 U.S.C. § 1988, even though they received neither compensatory damages nor declaratory or injunctive relief. Moreover, the district judge did not conclude that plaintiffs' "victory" would be a catalyst for changes in state policy

or practices. Instead, the district judge justified his conclusion that plaintiffs had "prevail[ed]" by noting the Court of Appeals' holding in an earlier phase of this case that plaintiffs were entitled to nominal damages not to exceed $1.00 and by asserting that plaintiffs had "vindicated" their reputations as a result of the litigation. The issue before this Court is whether the Court of Appeals properly reversed the district judge's construction and application of § 1988.

The complaint. In 1975, Joseph Davis Farrar brought this civil rights action for money damages and injunctive relief under 42 U.S.C. §§ 1983 and 1985. Named as defendants were respondent, William P. Hobby Jr., then Lieutenant Governor of Texas, two elected officials of Liberty County, Texas, and three state employees. Farrar charged the defendants with having engaged in various conspiracies to deprive him of his ownership and operation of Artesia Hall, a private reform school for minors with drug-related, academic, and disciplinary problems.[1] Later amendments added Dale Lawson Farrar, Joseph Farrar's son and an employee at Artesia Hall, as a plaintiff, dropped the demand for injunctive relief, and requested as sole relief $17 million in monetary damages.

[1] In 1979, the district court granted the defendants' motions for summary judgment. A panel of the Fifth Circuit in 1981 vacated the summary judgment and remanded the case for written findings of fact and conclusions of law, directing the district court to reconsider its ruling in light of recent cases regarding the doctrine of sovereign immunity. *Farrar v. Cain*, 642 F.2d 86 (5th Cir. 1981) (per curiam) (*Farrar I*). On remand, the district court denied the motions for summary judgment.

(J.A., p. 21).[2] Joseph Farrar died in 1983, before trial. Petitioners, the co-administrators of his estate, were substituted as plaintiffs. (J.A., p. 21).

The proof at trial. Because of the fee-awarding trial court's observations in its order regarding the "significant vindication of the Farrars" (Pet. App., p. 26), it is appropriate to discuss the uncontradicted testimony regarding the Farrars' operation of Artesia Hall, which proved a pattern of sexual abuse and gruesome conditions at the school. Many witnesses testified in graphic, largely uncontroverted detail about the conditions that prompted the actions of the defendants. Media interest and coverage was intense and began before Hobby had any involvement in the matter. (See Pltf. Ex. 102A, a collection of all or most of the extensive newspaper publicity, introduced in evidence by the Farrars).

A fifteen-year-old male student at Artesia Hall testified that he had been routinely sexually abused by Farrar. The boy was moved from his dormitory into the trailer that Farrar used as a residence and told that he would be Farrar's "assistant." The boy testified that these sexual assaults by Farrar continued for a long period. He also related Farrar's statements that he had engaged in such conduct with other male students. (S.F., pp. 3458-61).

[2] References to the Joint Appendix are abbreviated "J.A." The Appendix to the Petition for Writ of Certiorari is referred to as "Pet. App." and the Appendix to Respondent's Brief in Opposition as "Br. Opp. App." References to the trial testimony are identified by "S.F." (Statement of Facts) and the appropriate page number. All emphasis in quotations has been added, unless otherwise stated.

A teacher at Artesia Hall described an incident that resulted in the death of a student, and ultimately led to Farrar's indictment for murder. The child had ingested poison, but Farrar insisted that she was "faking." He instructed others to walk the girl around the school courtyard. She began experiencing convulsions the next day, but Farrar still insisted that the girl was merely "faking." He suggested that her temperature be taken rectally, without lubrication; and Farrar himself shook the dying girl and applied the juice of hot peppers to her lips in order to elicit a "reaction." Eventually the girl was taken to a hospital, where she died. (S.F., pp. 2961-62, 3233-44).

Other witnesses described the cruel and bizarre "discipline" administered to the children at Artesia Hall: routine forms of "punishment" included confinement in an outdoor "cage," handcuffing, severe shaking, hairpulling, and haircutting. In one incident, girls were punished by not being allowed to bathe and by being denied the use of commodes. Other students were beaten. (S.F., pp. 768, 784, 867-68, 2344, 2445-48, 2853, 2877, 2939, 2945, 3107, 3110-14, 3178, 3215, 3221-22, 3448-49).

In 1973, after the death of the Artesia Hall student, the Liberty County grand jury indicted Joseph Farrar for murder. The indictment charged that Farrar had willfully failed to administer medical treatment to the dying student and had failed timely to provide for her hospitalization. (S.F., pp. 484-85). One week later, the Texas Attorney General obtained a state district court order closing Artesia Hall. The order was based upon the state's belief that there existed a clear and present danger of physical and mental intimidation of the students at Artesia Hall and that, because of the events surrounding the indictment of

Joseph Farrar, Artesia Hall could not be safely administered by its staff. (S.F., pp. 555-56).

Hobby's role in the state's closing of Artesia Hall remains unclear. Joseph Farrar himself testified by deposition that Hobby had nothing to do with the murder indictment. (S.F., p. 3766). Indeed, Hobby had never heard of the Farrars or Artesia Hall until Joseph Farrar's indictment was reported by the media. Hobby first learned the details of the conditions at Artesia Hall from a member of the state legislature, who told Hobby that students there were being abused. (S.F., pp. 1435-38, 1444-45, 1521). A member of the grand jury that indicted Farrar urged the State through Hobby to take action to protect children confined under the Farrars' "care." (S.F., pp. 1487-88).

Shortly after the indictment, Hobby issued a press release criticizing the Texas Department of Public Welfare ("DPW") and its licensing procedures for child care facilities. (S.F., p. 1442). In addition, Hobby urged the director of the DPW to investigate the situation at Artesia Hall. He also requested that the DPW confer with the Texas Attorney General's office regarding the possible revocation of the school's charter. (S.F., pp. 1449-69).

In the meantime, news of the conditions at Artesia Hall had also reached the Governor of Texas, Dolph Briscoe. After meeting with state officials, including Hobby, Briscoe decided to inspect the facility personally. He did so, accompanied by Hobby and others. After touring the school, Briscoe met with officials of the Texas Attorney General's office and requested that they take whatever legal steps were necessary to protect the children. (S.F.,

pp. 3729-35). Later that evening, a state district judge in Liberty County granted the state's application for a temporary restraining order. Although Hobby attended the hearing on the state's application, he exercised no control over the Attorney General and said nothing during the proceedings; he merely observed. (S.F., pp. 1373, 1380-81, 1501-1505).

The jury's verdict. The case was submitted to the jury on ten special interrogatories. (Br. Opp. App., pp. 1-4). The jury found, among other things, that all of the defendants *except* Hobby had engaged in a conspiracy against one or more of the plaintiffs; that this conspiracy was *not* the proximate cause of any damages to the Farrars; that Hobby "committed an act or acts under color of state law that deprived Plaintiff Joseph Davis Farrar of a civil right guaranteed by the Constitution and laws of the United States and the State of Texas"; but that the act or acts of Hobby were *not* a proximate cause of any damages to Joseph Farrar. Dale Farrar obtained no favorable findings. Based upon these answers, the court ordered "that Plaintiffs take nothing, that the action be dismissed on the merits, and that the parties bear their own costs." (Br. Opp. App., pp. 5-6).

Farrar II. A panel of the Fifth Circuit affirmed the judgment in part but held that the district court had erred in failing to award Joseph Farrar nominal damages not to exceed $1.00, based upon the jury's finding of Hobby's unspecified violation of his constitutional rights. *Farrar v. Cain,* 756 F.2d 1148 (5th Cir. 1985) (*Farrar II*). The Fifth Circuit's mandate remanded the case to the district court for further proceedings consistent with its opinion but did not itself award nominal damages. (Mandate of

5/24/85, Dkt. Entry 239). Moreover, judgment for nominal damages not to exceed $1.00 was never sought and none has ever been entered. The Farrars' right to such a judgment has thus been waived. Fed. R. Civ. P. 59, 60.

The attorneys' fee award. The Farrars' lawyers did, however, seek attorneys' fees and expenses under 42 U.S.C. § 1988; and a newly-appointed district judge,[3] after a hearing, granted the full amount of the Farrars' request, awarding a total of $317,662 in attorneys' fees and expenses, plus interest, against Hobby and nothing against the other defendants. (Pet. App., p. 12).

In rendering this award, the district court conceded that it was unclear precisely what constitutional violations the jury had found as to Hobby, noting that "the jury's instructions made it difficult to discern exactly what the jury found." (Pet. App., p. 15). As a result, the court concluded that "abrupt policy changes are not likely to follow as a result of this order," (*id.* at 24), and that "plaintiffs can trace no revolution in public administration by reason of this case." (*Id.* at 28). Moreover, the district court treated as "neutral" the fact that Joseph Farrar was entitled to receive only $1.00 on a $17 million claim because the liability determination, standing alone, was a "significant vindication" of the Farrars. (*Id.* at 26). The trial court did not explain how this conclusion could

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[3] Judge Lynn Hughes, the judge who awarded the fees, was not the trial judge. After the entry of the initial judgment, Judge Robert O'Conor resigned and was succeeded after *Farrar II* by Judge Hughes, whose fee award is the basis of the present controversy.

be squared with the jury's finding that factors other than the violations found by the jury had caused the closure of the Farrars' school.

***Farrar III* – the decision below.** The Fifth Circuit reversed the award. Applying this Court's decisions in *Texas State Teachers Ass'n v. Garland Independent School District,*[4] *Rhodes v. Stewart,*[5] and *Hewitt v. Helms,*[6] the court concluded that the Farrars were not "prevailing parties" within the meaning of 42 U.S.C. § 1988:

> The Farrars sued for $17 million in money damages; the jury gave them nothing. No money damages. No declaratory relief. No injunctive relief. Nothing. "That is not the stuff of which legal victories are made." Of course, as the district court emphasized, the Farrars did succeed in securing a jury-finding that Hobby violated their civil rights[7] and a nominal award of one dollar. However, this finding did not in any meaningful sense "change the legal relationship" between the Farrars and Hobby. Nor was the result a success for the Farrars on a "significant issue that achieve[d] some of the benefit the [Farrars] sought in bringing suit." When the sole relief sought is money damages, we fail to see how a party "prevails" by winning one dollar out of the $17 million requested. Furthermore, even if the Farrars could be seen as victors, given their singular objective of money damages, surely theirs was "a technical victory . . . so insignificant, and . . . so near the situations addressed in *Hewitt* and *Rhodes,* as to be insufficient to support prevailing party status."

Estate of Farrar v. Cain, 941 F.2d 1311, 1315 (5th Cir. 1991) (*Farrar III*) (Pet. App., pp. 38-39) (footnotes omitted) (alterations in original). Like the district court, the Court of Appeals recognized that plaintiffs had neither sought nor achieved any change in Texas policies or practices:

> This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more.

941 F.2d at 1315 (Pet. App., p. 40).

The dissenting judge below had "difficulty understanding the justification for the finding that [Lieutenant] Governor Hobby violated plaintiffs' civil rights," 941 F.2d at 1317 (Reavley, J., dissenting) (Pet. App., p. 45), further emphasizing that the judgment had established no constitutional principles (or other guides to conduct) that could serve as a basis for revision of state policies or practices by Lt. Governor Hobby or future Lieutenant Governors. Moreover, the dissenting judge, unlike the majority, addressed Hobby's alternative argument that the trial court abused its discretion in setting the amount of the fee award, and would have remanded the case for a redetermination of that award. *Id.*

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[4] 489 U.S. 782 (1989).

[5] 488 U.S. 1 (1988) (per curiam).

[6] 482 U.S. 755 (1987).

[7] In fact, only Joseph Farrar obtained a favorable jury finding; Dale Farrar got none. (Br. Opp. App., p. 3; S.F., p. 565).

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit's decision is correct. The Farrars are not "prevailing parties" because the Farrars obtained none of the relief sought and failed either to alter materially the legal relationship between them and Hobby or to elicit any changes in Texas policy or practices. They sought but one thing in their lawsuit: huge compensatory damages. The jury gave them nothing. The holding of the appellate court in *Farrar II* that Joseph Farrar was entitled to nominal damages (which has never matured to judgment and has never been collected by the Farrars) did not materially alter the legal relationship between the Farrars and Hobby. The "award" of nominal damages (even if it had been reduced to a judgment) is the kind of insignificant, technical "success" that, as this Court observed in *Garland*, cannot support an award of attorneys' fees.

2. Congress never intended that a right to an award of nominal damages (in a case in which the plaintiff seeks compensatory damages only and achieves no change in governmental or institutional conduct) would support an award of attorneys' fees. The Fifth Circuit's decision is entirely consistent with the purpose of the statute, which is to allow fee recovery only by those who truly "prevail" in some tangible way and to deny fees where such an award would be unjust.

3. It is settled law that nominal damages do not justify the imposition of costs or attorneys' fees. Congressional intent must be ascertained in the light of this history and the purpose of § 1988 to encourage meritorious litigation only.

4. The district court clearly abused its discretion in setting the amount of the fee award. Although the Court of Appeals did not base its decision on this ground, Hobby has preserved the question for this Court's review by raising it in both courts below. The district court's error in determining the size of the fee award is plain and must be corrected even if the Farrars' position in this Court were accepted.

ARGUMENT

I. The right to an award of nominal damages to Joseph Farrar's estate did not materially alter the legal relationship between the Farrars and Hobby. It was, at most, a "technical or *de minimis*" success.

The fee-awarding trial judge refused this Court's guidance by failing to apply the clear standard enunciated in *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782 (1989). There, the Court unanimously held: "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit' the plaintiff has crossed the threshold to a fee award of some kind." *Id.* at 791-92 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)) (alteration in original). Like the district court, the Farrars here contend that they are "prevailing parties" by focusing exclusively upon the liability determination made by the jury regarding Hobby's unexplained violation of their constitutional rights and ignore the remedial phase of the case. However, this Court's decision in *Garland*, as well as its earlier

opinions in *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988), make clear that in order to prevail a plaintiff must obtain "some *relief* on the merits," *Garland*, 489 U.S. at 790 (citing *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980)). *See also Garland*, 489 U.S. at 791 (plaintiff must obtain "some of the *relief* sought.").[8]

Thus, under *Garland*, the dispositive test is whether the relief granted has brought about "changes [in the] legal relationship between [the plaintiff] and the defendant." 489 U.S. at 792. And as *Hewitt*, 482 U.S. at 761, makes clear, such a change in a legal relationship requires more than a liability determination:

> At the end of the rainbow lies not a judgment, but some action by the defendant that the judgment produces – the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant.

(emphasis in original). *See also Rhodes*, 488 U.S. at 4 ("In the absence of relief, a party cannot meet the threshold requirement of § 1988 . . . .").

Garland also makes clear that the relief won by plaintiff must bring about a change in the legal relationship that is "material," not merely "technical":

> The touchstone of the prevailing party inquiry must be the *material* alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.

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[8] The ABA completely misunderstands *Garland*, *Hewitt* and *Rhodes* in contending (ABA Amicus Br., pp. 13-14) that success on the liability phase of the case entitles plaintiffs' counsel to their fees.

489 U.S. at 792-93. For that reason, no attorneys' fees are to be awarded if the victory in the litigation is merely "technical." Such "purely technical or *de minimis*" relief would fall short of even the " 'generous formulation we adopt today.' " *Garland*, 489 U.S. at 792 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 279 n.3 (1st Cir. 1978)).

The *Garland* test was a natural evolution from the teaching of this Court in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980), as well as *Hewitt* and *Rhodes*.[9]

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[9] The cases cited favorably by this Court in *Garland* (*see* 489 U.S. at 784) do not support the Farrars' position. *Gingras v. Lloyd*, 740 F.2d 210 (2d Cir. 1984), held that even in a case where the judgment was a "catalyst" for change in state policy, the trial court, in order to award attorneys' fees, must find that plaintiffs improved their own situation *as a result of the lawsuit*. Appointment of a special master who helped assure that plaintiffs' confinement was constitutionally appropriate did not create prevailing party status. *Id.* at 213. Plaintiff in *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985), succeeded in eradicating an unconstitutional seizure statute and was thus a "prevailing party" because of this real relief. Plaintiff in *Fast v. School District of Ladue*, 728 F.2d 1030 (8th Cir. 1985), received $1.00 in nominal damages *and* declaratory and injunctive relief granting her substantial rights. In addition, "the relief granted . . . was not, as a practical matter, limited to the named plaintiff." *Id.* at 1034. In *Lummi Indian Tribe v. Oltman*, 720 F.2d 1124 (9th Cir. 1983), plaintiffs succeeded by gaining access to valuable fishing rights. The court emphasized that in order to be a "prevailing party" the plaintiff must establish " 'some sort of clear, causal relationship between the *litigation brought and the practical outcome realized.*' " *Id.* at 1125 (quoting *American Constitution Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981)). In *Nephew v. City of Aurora*, 766 F.2d 1464 (10th Cir. 1985), *cert denied*, 485 U.S. 976 (1988), the court held that it was error for a trial judge to award $12,500 in fees to attorneys whose plaintiffs recovered $100.00.

The language and judicial attitude of *Hensley* is inconsistent with the Farrars' position. The Court there said: "The *result* is what matters," 461 U.S. at 435. "Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained.*" *Id.* at 436.

In *Hanrahan,* the relief that the alleged "prevailing" litigant received was more significant than Joseph Farrar's entitlement to a judgment not to exceed $1.00 in nominal damages, yet Hanrahan was not a "prevailing party." Plaintiff there obtained on appeal the very valuable right to discover the identity of an informant and thus potentially to find the key to a successful defense. 446 U.S. at 756. But this did not make the plaintiff a "prevailing party" because of the Congressional intent that a party be deemed so only in the event that there has been "a determination of the 'substantial rights of the parties' . . . . " 446 U.S. at 758.[10]

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[10] *Hanrahan,* like the Farrar's case, is an example of the outrageous waste created by meritless "conspiracy" allegations. The trial lasted eighteen months and was followed by multiple appeals despite a trial court determination that the record was " 'devoid of proof of . . . participation [by the federal defendants] in a conspiratorial plan.' " 446 U.S. at 761 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in part and dissenting in part) (alterations in original). Adoption of the rule advocated by the Farrars can only encourage meritless litigation – all in contravention of Congress' purpose; i.e., to create an incentive for prosecuting good cases but to discourage the pursuit of meritless ones.

Rhodes emphasizes that *Garland* requires that the judgment materially alter either the defendant's conduct as to plaintiff or the legal relationship between them. As in the Farrars' case, the allegedly aggrieved plaintiff had died by the time the court entered the order decreeing that as a prison inmate he was entitled to subscribe to certain magazines. Thus, plaintiff was not a "prevailing party" because:

> A modification of prison policies on magazine subscriptions could not in any way have benefited either plaintiff, one of whom was dead and the other released before the District Court entered its order.

Rhodes, 488 U.S. at 4.

The conflict in the circuits referred to in the Fifth Circuit's opinion is more apparent than real. Of the dozens of pertinent cases only three are in conflict with the Fifth Circuit's opinion.[11]

An excellent current example of a circuit court's faithfully applying the *Garland* standard is *Christopher P., ex rel. Norma P. v. Marcus,* 915 F.2d 794 (2d Cir. 1990), *cert.*

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[11] *Romberg v. Nichols,* 953 F.2d 1152 (9th Cir. 1992); *Ruggiero v. Kreminski,* 928 F.2d 558 (2d Cir. 1991) (Jury determined that plaintiff's Fourth and Fourteenth Amendment rights were violated by a search conducted by police officers and awarded nominal, not compensatory, damages); *Tedesco v. City of Stamford,* 588 A.2d 656 (Conn. App. 1991), *cert. granted in part,* 593 A.2d 137 (Conn. 1991) (Plaintiff was entitled to $1.00 for city's failure to afford him a constitutionally adequate post-termination hearing. Such award did not bar plaintiff from recovering attorneys' fees in a § 1983 action. The court did not discuss *Garland.*).

denied, 111 S. Ct. 1081 (1991). There, the plaintiff obtained a temporary restraining order that had the effect of placing him back in the school he wished to attend and also achieved a favorable statement of the law. But, on the basis of a *Garland* analysis, the same plaintiff was held not to be a "prevailing party." Many other cases correctly apply *Garland*.[12] The few wrongly decided cases illustrate

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[12] *See Lewis v. Kendrick*, 944 F.2d 949 (1st Cir. 1991) (Jury award for Fourth Amendment violation was technical and *de minimis* where plaintiff sought $300,000 and received jury verdict for $1,000. Court suggested that plaintiff's counsel acted improperly in even claiming substantial attorneys' fee where recovery fell so far short of that requested.); *Langton v. Johnston*, 928 F.2d 1206, 1226 (1st Cir. 1991) (Prison case in which plaintiffs failed on most issues, but achieved arguable success on issue of "double bunking"; but if issue of "double bunking" was of only "minor significance," or did not have a "catalytic effect" in bringing about abandonment of the practice, no fees may be awarded.); *Denny v. Hinton*, 131 F.R.D. 659 (M.D.N.C. 1990), *aff'd mem., Denny v. Elliot*, 937 F.2d 602 (4th Cir. 1992) and *Lawrence v. Hinton*, 937 F.2d 603 (4th Cir. 1991) (Jury verdict in favor of plaintiff for $1.00 was *de minimis*, since judgment obviously had no effect on relationship between plaintiff and defendant.); *Northbrook Excess & Surplus Ins. v. Proctor & Gamble*, 924 F.2d 633, 641-42 n.11 (7th Cir. 1991) (Court held that recovery of $45,000 in light of claim of more than $5 million was *de minimis*; thus, party did not prevail.); *Warren v. Fanning*, 950 F.2d 1370 (8th Cir. 1991), *petition for cert. filed* (Mar. 27, 1992) (No. 91-8221) (Jury verdict finding that plaintiff's Eighth Amendment rights were violated was a "pyrrhic victory" where no damages were awarded and thus *de minimis* under *Garland*. Plaintiff was not prevailing party.); *Slade ex rel. Estate of Slade v. United States Postal Service*, 952 F.2d 357 (10th Cir. 1991) (Plaintiff was not prevailing party even though he obtained right to be evaluated on non-discriminatory criteria.); *Walker v. Anderson Electrical Connectors*, 944 F.2d

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the bizarre results that flow from the "standard" advocated on behalf of Joseph Farrar.

In *Romberg v. Nichols*, 953 F.2d 1152 (9th Cir. 1992), two policemen risked their lives to rush into the Rombergs' apartment because they justifiably believed their action was necessary to save Mrs. Romberg from serious harm. Mr. Romberg appeared to be threatening to inflict death or serious harm, and the Rombergs were subsequently convicted of disturbing the peace. Even the trial court found that the police entered because they honestly feared for Mrs. Romberg's safety; but because the entry was without a search warrant it was held to be a deprivation of constitutional rights. The Rombergs were awarded $1.00 in nominal damages *and* $29,137.50 in attorneys' fees against the officers who had risked their lives to save Mrs. Romberg from Mr. Romberg's violent behavior.

Romberg is distinguishable from this case because the Rombergs' counsel at trial actually argued for nominal damages when he sensed that the jury might rule against

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841, 846-47 (11th Cir. 1991), *petition for cert. filed* (May 8, 1992) (No. 91-1794) (Mere fact that jury found defendant committed acts of sexual harassment and thus violated statute did not entitle plaintiff to attorneys' fees under *Garland*, *Hewitt* and *Rhodes*.); *Carr v. City of Florence*, 729 F. Supp. 783, 791 (N.D. Ala. 1990), *aff'd*, 934 F.2d 1264 (11th Cir. 1991) (Attorneys' fees denied even though jury found that when citizen was slapped by police officers his rights were violated and awarded plaintiff $100.00 in compensatory damages, judgment was still "purely technical" and *de minimis*.).

his clients on liability if they sought compensatory damages. However, *Romberg* illustrates the type of result that would be encouraged by the Farrars' approach were it adopted by this Court, and it shows that the rule advocated by Farrars' counsel can create a conflict between the interests of the attorney and the client.

A. An award of nominal damages that does not cause a change in policy or practice is "purely technical or *de minimis*."

The examples of "purely technical or de minimis" success precluding an attorneys' fee award to which the Court's opinion in *Garland* refers all involved situations in which the success was "de minimis." But in each the relief obtained was more substantial than that achieved by Joseph Farrar's estate:

1. The right to "talk union" or hold union meetings on school grounds after regular school hours without the consent of the school's principal. *Garland*, 489 U.S. at 786-87.

2. A holding that one "minor" regulation of the Human Resources Administration was unconstitutional. *Id.* at 792 (citing *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718 (2d Cir. 1984)).

3. Plaintiff who had recovered $16,000 was entitled to attorneys' fees only if the trial court determined that "the basic objectives plaintiffs seek from the lawsuit have been achieved or furthered in a significant way" and holding that "[n]uisance settlements, of course, should not give rise to a 'prevailing'

plaintiff." *Chicano Police Officer's Ass'n v. Stover*, 624 F.2d 127, 131 (10th Cir. 1980), cited in *Garland*, 489 U.S. at 792.

An award of "nominal damages" is, by definition, precisely the kind of "technical or *de minimis* victory" that this Court described in *Garland* – a "success" that does not trigger a fee award under § 1988. Nominal damages are not minuscule compensatory damages; instead, they are totally different in kind, character and amount from compensatory damages. Courts throughout history have consistently recognized that nominal damages are symbolic, a recognition of a mere technical invasion of rights. *E.g., Chesapeake & Potomac Tel. Co. v. Clay*, 194 F.2d 888, 890 (D.C. Cir. 1952) ("[N]ominal damages means a trivial sum – usually one cent or one dollar – awarded to a plaintiff whose legal right has been technically violated but who has proved no real damage.").[13] Commentators

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[13] *See also Guthridge v. Pen-Mod, Inc.*, 239 A.2d 709, 714 (Del. Super. Ct. 1967) ("Nominal damages are damages in name only, not damages in fact."); *Ballenger Paving Co. v. North Carolina State Highway Comm'n*, 129 S.E.2d 245, 248 (N.C. 1963) (Nominal damages are " 'a small trivial sum awarded in recognition of a technical injury which has caused no substantial damage.' ") (quoting *Hairston v. Atlantic Greyhound Corp.*, 18 S.E.2d 166 (N.C. 1942)); *Womack v. Ward*, 186 S.W.2d 619, 620 (Tenn. Ct. App. 1944) ("Nominal damages are given, not as an equivalent for the wrong, but in recognition of a technical injury . . . . "); *Price v. McComish*, 70 P.2d 978, 982 (Cal. Dist. Ct. App. 1937) ("Nominal damages are so called in contradistinction to actual, substantial, or compensatory damages."); *Flournoy v. Story*, 37 S.W.2d 272, 273 (Tex. Civ. App. – Ft. Worth 1930, no writ) ("Nominal damages are not actual damages, but an arbitrary amount that may be assessed by court or jury for the

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have described the function of nominal damages in similar terms. *E.g.*, Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.8, at 191 (1973) (Nominal damages "do not represent 'damages' at all.").[14] Lexicographers agree that nominal damages are tantamount to no relief at all. Webster's defines "nominal" as "existing or being something in name or form but usually not in reality."[15]

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invasion of a legal right, even though no actual damage may be awarded."); *Michael v. Curtis*, 22 A. 949, 951 (Conn. 1891) ("Nominal damages mean no damages. They exist only in name, and not in amount."); *Beaumont v. Greathead*, 135 Eng. Rep. 1039, 1041 (C.P. 1846) ("Nominal damages . . . mean a sum of money that may be spoken of, but that has no existence in point of quantity . . . . ").

[14] *Accord* 1 Theodore Sedgwick et al., *A Treatise on the Measure of Damages* § 98, at 167 (9th ed. 1913) ("[N]ominal damages may be recovered for the bare infringement of a right, or for a breach of contract, unaccompanied by any actual damage."); 1 Joseph A. Joyce & Howard C. Joyce, *A Treatise on Damages* § 8, at 6 (1903) ("Nominal damages are a small and trivial sum awarded for a technical injury due to a violation or invasion of some legal right . . . . "); 1 J. G. Sutherland & John R. Berryman, *A Treatise on the Law of Damages* § 9, at 31 (4th ed. 1916) (Nominal damages are "a sum of money that can be spoken of, but has no existence in point of quantity."); Ralph S. Bauer, *Essentials of the Law of Damages* § 42, at 111 (1919) ("In any case in which there is a mere technical right of action, no more than nominal damages may be awarded."); Charles T. McCormick, *Handbook on the Law of Damages* § 20, at 85 (1935) ("Nominal damages are damages awarded in a trivial amount merely as a recognition of some breach of a duty owed by defendant to plaintiff and not as a measure of recompense for loss or detriment sustained.") (footnote omitted).

[15] *Webster's Third New International Dictionary* 1534 (Philip B. Grove ed., 1981). *Accord Black's Law Dictionary* 392 (6th ed.

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Joseph Farrar's estate's right to receive a judgment for an amount not to exceed one dollar worked at most a "technical" alteration in the legal relationship between the Farrars and Hobby. A better example of a *de minimis* or technical "victory" of the sort described in *Garland* can hardly be imagined. Indeed, the outcome was so insignificant that the Farrars and their attorneys have not bothered even to request that the district court sign a judgment for nominal damages against Hobby, let alone attempted to collect them.[16] Thus the record does not support the Farrars' characterization of the issue on which this Court granted certiorari: "Does 42 U.S.C. § 1988 authorize the award of reasonable attorneys' fees to civil rights plaintiffs who *recover* nominal damages?" (Pet. Cert., p.i). Since the Farrars have not, in fact, "recovered" nominal damages, Hobby respectfully suggests that

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1990) ("Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of his rights. . . . "); 10 *Oxford English Dictionary* 471 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) ("Existing in name only, in distinction to real or actual; merely named, stated, or expressed, without reference to reality or fact.").

[16] After holding that the trial court erred in failing to award nominal damages, the Fifth Circuit remanded the case to the district court "for proceedings consistent with this opinion." *Farrar v. Cain*, 756 F.2d 1153 (5th Cir. 1985). (Pet. App., pp. 10-11.) Following remand, the district court has not signed a judgment against Hobby for nominal damages, nor have the Farrars requested that it do so.

the writ of certiorari should be dismissed as improvidently granted.[17]

B. The Farrars achieved none of the benefits they sought in bringing their lawsuit.

The Farrars neither sought nor obtained injunctive, declaratory, or other relief that resulted in any material alteration of their long-past and fleeting legal relationship with Hobby. Rather, the Farrars wanted just one thing; compensatory damages. They obtained none.

But instead of evaluating the Farrars' failure to obtain relief, the district court speculated on the "cumulative effect" that the lawsuit might have on the behavior of government officials. (Pet. App., p.24). The reasoning employed by the district court in this regard is circular and ignores *Garland*.

As justification for concluding that the Farrars "succeeded" in their civil rights action within the meaning of § 1988, the district court turned back to § 1988: "Awarding attorneys' fees when a plaintiff has shown the deprivation of liberty and property without due process, as the Farrars have done, encourages state actors to examine the legality of their actions." (Pet. App., p.23). In other words, according to the district court, the Farrars would be the "prevailing parties" within the meaning of § 1988

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[17] *See, e.g, Phillips v. New York*, 362 U.S. 456 (1960) (dismissing writ as improvidently granted because "the totality of the circumstances as the record makes them manifest did not warrant bringing the case here").

if they were awarded fees under § 1988, thus the circle in the trial court's reasoning.

Moreover, the district court's speculation on the deterrent effect of this lawsuit as a basis for an award of attorneys' fees misses the point and is bad policy. As this Court stated in *Garland*, a plaintiff must first be "a prevailing party within the meaning of § 1988" to be entitled to attorneys' fees. 489 U.S. at 791. This inquiry depends on the plaintiffs' success in obtaining relief in the underlying lawsuit. *Id.* The Fifth Circuit correctly analyzed the Farrars' "success" under that standard: "When the sole relief sought is money damages, we fail to see how a party 'prevails' by winning one dollar out of the $17 million requested." *Estate of Farrar v. Cain*, 941 F.2d 1311, 1315 (5th Cir. 1991). (Pet. App., p.39).

The Farrars argue that the Fifth Circuit's holding conflicts with this Court's decision in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), and they criticize the opinion below for failing to "discuss or cite" *Rivera*. (Pet. Br., p.10). The Farrars' assertion is incorrect and their criticism misplaced because the *Rivera* plaintiffs achieved some of what they sought – compensatory damages. *Rivera* presented the narrow issue "whether an award of attorney's fees under 42 U.S.C. § 1988 is *per se* 'unreasonable' within the meaning of the statute if it exceeds the amount of damages recovered by the plaintiff in the underlying civil rights action." 477 U.S. at 564. *Rivera*, therefore, was concerned with the proper *amount* of a fee award, not the plaintiff's entitlement to any award at all.

The Fifth Circuit concluded in this case that the Farrars failed to cross "the threshold to a fee award of some

kind." *Estate of Farrar*, 941 F.2d at 1313 (Pet. App., p. 35) (quoting *Garland*, 489 U.S. at 792). The Fifth Circuit did *not* base its holding on the amount of the fees awarded. Rather, the Fifth Circuit reached only the question of the right to any fee *at all*:

> [W]e hold that when the sole object of a suit is to recover money damages, the recovery of one dollar is no victory under § 1988. This was no struggle over constitutional principles. It was a damage suit and surely so since plaintiffs sought nothing more. We must – under *Garland*, *Hewitt*, and *Rhodes* – inquire into whether the plaintiff's victory, as measured by the relief actually obtained, was merely a *de minimis* or technical success.

941 F.2d at 1315-16 (footnote omitted).

Thus, as *Garland* required it to do, the Fifth Circuit examined whether the Farrars succeeded on "any significant issue in litigation" and whether that success "achieved some of the benefit" they sought in bringing their lawsuit. The Fifth Circuit did *not* justify its holding on the basis that the fee award ($317,662) was disproportionate to the amount of nominal damages (an amount not to exceed $1.00).

Nor can the Farrars legitimately claim, as the district court concluded, that the jury's one finding in their favor has, like a declaratory judgment, somehow "vindicated" their rights. This Court in *Hewitt v. Helms* expressly rejected that theory. There, too, the argument was advanced that a plaintiff had been "vindicated" by a judicial holding that his rights had been violated. Rejecting the very type of argument that ultimately succeeded

in the trial court here, this Court held that the mere "moral satisfaction of knowing that a federal court concluded that [plaintiff's] rights had been violated," 482 U.S. at 762, could not be the basis for a prevailing party determination under § 1988.[18]

Hewitt bears a strong resemblance to this case. In *Hewitt*, a state prisoner (Helms) sought compensatory damages and injunctive relief based on a claim that procedural due process had been denied him; but his release mooted the latter claim; and no judgment was ever entered granting him any relief. Helms enjoyed a declaration that his right to procedural due process had been denied. Here, Dale Farrar received nothing; and Joseph Farrar died before the case came to trial, so that a judgment regarding his procedural due process rights cannot avail him. And his estate recovered nothing – not even the nominal damages not to exceed $1.00 that the Fifth Circuit concluded would be appropriate. As this Court noted in *Hewitt*, "Respect for ordinary language requires that a plaintiff *receive* at least *some* relief on the merits of

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[18] In *Roth v. Pritikin*, 878 F.2d 54 (2d Cir. 1988), a litigant enjoyed the fact that the trial court expressed in writing an acceptance of his, rather than his adversary's, credibility – but this "vindication" did not make him a prevailing party. Similarly, if the Farrars' position here were accepted, a plaintiff who had received no judicial relief might successfully argue that he had achieved "prevailing party" status because of a favorable testimonial admission from his adversary even though that admission did not result in a favorable judgment.

his claim before he can be said to prevail." 482 U.S. at 760.[19]

By contrast, the dictum from *Carey v. Piphus*, 435 U.S. 247 (1978), does not advance the Farrars' position. In *Carey*, students sued two public schools and their officials under 42 U.S.C. § 1983, alleging that the students had been suspended without procedural due process. *Id.* at 248.[20] The plaintiffs sought declaratory and equitable relief, as well as actual and punitive damages. *Id.* at 250. This Court "granted certiorari to consider whether, in an action under § 1983 for deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages." *Id.* at 253. On this specific issue, it held "that in the absence of proof of actual injury, the students are entitled to recover only nominal damages." *Id.* at 248. In a footnote, the Court added the following: "We also note that the potential liability of

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[19] In an additional parallel to the plaintiff in *Hewitt*, the one "favorable" judicial pronouncement that Joseph Farrar obtained – the jury verdict and the Fifth Circuit's opinion directing the entry of nominal damages – has never been translated into an actual judgment. *See Hewitt*, 482 U.S. at 760 ("[T]he fact is that Helms' counsel never took the steps necessary to have a declaratory judgment or expungement order properly entered. Consequently, Helms received no judicial relief.").

[20] *Carey* supports Hobby's position because its essential holding is that, while civil rights litigation is extremely important, it still must be regarded as part of the real world – a civil rights plaintiff must prove and persuade the fact finder that he has suffered real damage to be entitled to a damages award.

§ 1983 defendants for attorney's fees . . . provides additional – and by no means inconsequential – assurance that agents of the State will not deliberately ignore due process rights." *Id.* at 257 n.11 (citations omitted).

The footnote reference to "potential liability" of a defendant under § 1988 does not analyze the circumstances under which such liability may arise. Nonetheless, the Farrars cite this language as support for their position.

The plaintiffs in *Carey*, however, had exposed a clear violation of due process in connection with the procedure by which children were suspended from public schools – a constantly recurring situation. Furthermore, the plaintiffs in *Carey*, unlike the Farrars, won injunctive and declaratory relief. 435 U.S. at 252. Thus, had the plaintiffs been awarded their attorneys' fees, the award would undoubtedly have been based upon their having established an important legal principle that could be seen as a "catalyst" for change in the schools' administration.[21]

The Farrars' lawsuit had no "catalyst" ramifications. It remains to this day unknown and unknowable what constitutional violation Hobby committed. Not one change was brought about or was foreseeably likely to have been brought about as a result of this lawsuit. The Farrars can point to no alteration of state policy, no adoption of any new policy, nor any change in conduct by

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[21] *But see Hewitt*, 482 U.S. at 763-64 (rejecting "catalyst" theory as a basis for awarding attorneys' fees where the plaintiff *himself* would not benefit from the change that his lawsuit prompted).

the defendants.[22] Even the district court conceded that "abrupt policy changes are not likely to follow as a result of" its order (Pet. App., p.24) and that the Farrars "can trace no revolution in public administration by reason of this case . . . . " (Pet. App., p.28). Nor can the jury verdict serve as a guide to other state officials since, as the trial court also conceded, "The jury instructions made it difficult to discern exactly what the jury found . . . ." (Pet. App., p.15) and, as to Hobby, it is impossible. In other words, the Farrars' lawsuit sought to change nothing except the Farrars' net worth. But it failed. *Carey*, therefore, is inapposite.

The concluding words of the Court in *Garland* show that plaintiffs do not qualify as prevailing parties here. In *Garland*, the plaintiffs' "success [had] materially altered the school district's policy . . . . Petitioners have thus served the "private attorney general" role which Congress meant to promote in enacting § 1988." 489 U.S. at 793.

Here, by contrast, all three judges of the Court of Appeals and even the judge who awarded the fees recognized that the Farrars' "victory" in the liability stage of

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[22] Indeed, in their Third Amended Complaint (Pet. App., pp.23-24) filed at the close of the evidence apparently to conform the pleadings to the proof at trial, the Farrars did not even *allege* Hobby's participation in some state practice or policy that infringed their constitutional rights. Rather, the allegations regarding Hobby were that he "met with" other state officials on June 20, 1973 to demand "the closing of Artesia Hall," and that he, Governor Briscoe, and other officials made a "highly publicized" inspection of Artesia Hall on June 22, 1973. (Pet. App., pp.30-31).

this case will lead to no policy changes by the State of Texas or its officials. Thus, the Farrars' argument that attorneys' fees should be awarded to "deter similar violations" (Pet. Br., p.6), or where the case establishes a "benchmark" for official behavior (*id.*), or "important legal or constitutional principles" (*id.* at 5), does not sustain their award here. As the Court of Appeals held, this was a case about money, not constitutional principles. Failing entirely on their money-damage claim, and instead being "awarded" a nominal $1.00, the Farrars have achieved none of the results they sought.[23]

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[23] The Fifth Circuit's opinion is not the restrictive, all-encompassing rule that the Farrars and the ABA have suggested. Under the circumstances here – money damages were the *sole* relief that the Farrars sought – the court concluded that the right to an award of nominal damages did not support the characterization of the Farrars as the "prevailing" parties. But the Fifth Circuit's opinion does not foreclose the possibility that an award of nominal damages – or *no* damages – might support an award under § 1988. If nominal damages are coupled with or bring about some change in state policy or some alteration of a defendant's conduct (i.e., a tangible, material alteration in the parties' legal relationship), or if an injunction or declaratory relief requires such a change or alteration, a fee award may be justified.

II. Congress did not intend that a plaintiff who recovers only nominal damages, which are not a catalyst producing changes in policy or practice, should be entitled to attorneys' fees under § 1988.

In examining the purposes behind the enactment of section 1988, this Court has observed that "a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting S. Rep. No. 94-1011, 94th Cong. 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912). The award in this case fails on both counts:

(1) the Farrars were *not* the prevailing parties; and

(2) the circumstances of this case make the award of attorneys' fees unjust.

After being subjected to a grueling trial of six weeks, Hobby and his counsel could hardly have been more pleased with the verdict. The jury exonerated Hobby of any involvement in a "conspiracy" against the Farrars. (Br. Opp. App., p.2). Although it found that Hobby committed some undefined act that deprived Joseph Farrar of a civil right, the jury also found this act was *not* a proximate cause of any damages to Joseph Farrar. (Br. Opp. App., p.3). Moreover, the judgment of the court which tried the case expressly provided that "plaintiffs take nothing, that the action be dismissed on the merits, and that *the parties bear their own costs.*" (Br. Opp. App., p.6). In a lawsuit in which the stakes were $17 million, what defendant would not be overjoyed by such an outcome?

The fee-awarding district judge (not the judge who heard six weeks of testimony), speculated in his memorandum opinion that: "It is perhaps because of [Joseph] Farrar's untimely death that large actual monetary damages were not proved and a take nothing judgment was entered." (Pet. App., p.15).[24] In other words, "the court may have attempted to make up to [plaintiffs] in attorney's fees what it felt the jury had wrongfully withheld from them in damages. . . . But a district court, in awarding attorney's fees under § 1988, does not sit to retry questions submitted to and decided by the jury." *City of Riverside v. Rivera*, 477 U.S. 561, 591 (1986) (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, J.J., dissenting).

Fifteen years after an apparent victory, Hobby got a rude awakening indeed: despite the fact that he defeated this lawsuit – walking away with a defendants' verdict of zero damages – he must pay over $300,000 in fees and expenses. In addition to suffering through the expense and harassment of defending (and prevailing) in this litigation, Hobby is slapped with an even greater injustice: he is ordered to pay his opponents' attorneys' fees and their costs. Awarding the Farrars their attorneys' fees and expenses, under the circumstances, would work the very kind of injustice Congress warned against when it enacted § 1988. *See Hensley*, 461 U.S. at 429. That the State's Lieutenant Governor, responding to the horrors of Artesia Hall, should be mulcted in damages or attorneys'

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[24] Actually, a lengthy deposition had been taken of Joseph Farrar; and the jury heard his side of the dispute through that testimony in intricate detail.

fees by reason of some unspecified procedural default on his part, committed in the process of calling them to a halt, does not resonate harmoniously with the purposes of § 1988 – rather the contrary.[25]

The Farrars' argument based on legislative history is largely answered by the above analysis of *Carey*: the importance of "vindicat[ing] important civil and constitutional rights that cannot be valued solely in monetary terms," or "secur[ing] important societal benefits," (Pet. Br., pp. 21-22; ABA Br., pp. 5-6) simply is inapposite in a case like this one, which involved no constitutional principle, but was instead only an attempt by the Farrars to secure an enormous damage award based upon alleged harm to their business.

The three recent Senate bills referred to by the Farrars (Pet. Br., p.22 n.9), are substantially identical. As S.133 102d Cong. 1st Sess., introduced in 1991, reveals, they provided, in pertinent part, that in awarding fees to plaintiffs who successfully sue the United States, a state, or a locality, "[t]he court . . . may reduce or deny the amount of attorneys' fees and related expenses otherwise allowable, based on a finding that . . . the amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the monetary result or injunctive relief achieved in the proceeding." This is not a "prevailing party" standard, but instead is an aid to courts in fixing the amount of fees and costs to be awarded.

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[25] The same statement can be made of each of the wrongly decided cases which adopt the approach of the fee-awarding trial judge in this case.

The pre-1976 cases relied upon by the Farrars (Pet. Br., pp.22-24), by no means support their reading of § 1988. For example, *Hammond v. Housing Authority*, 328 F. Supp. 586, 588 (D. Ore. 1971), a case characterized by the Farrars as "particiularly significant" (Pet. Br., p.23 n.10), typifies the sort of case in which an award of nominal damages can properly support attorneys' fees: the liability phase of the case uncovered a clear record of impermissible, class-based discrimination, violative of the Fourteenth Amendment, which led to a rectification of the defendants' practices in a fashion that benefitted the plaintiffs and others similarly situated. Plaintiffs were awarded nominal damages and attorneys' fees of $1,000.

Section 1988 was passed in response to this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), where this Court limited the application of the "private attorney general" concept being applied by some lower courts.[26] The Farrars argue that under the "private attorney general" concept as it existed before *Alyeska*, attorneys' fees were routinely awarded in cases where plaintiffs received only nominal damages; but examination of those authorities reveals that before the enactment of § 1988 (as, of course, after) nominal damages alone, without injunctive, declaratory relief, or catalytic change did not support attorneys' fee awards.[27] Diligent search has revealed no pre-*Alyeska*

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[26] *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

[27] *Skehan v. Board of Trustees*, 501 F.2d 31 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975), does not support the Farrars'

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case in which attorneys' fees were awarded under a private attorney general theory where a plaintiff had achieved no injunctive, declaratory or class relief and the court's judgment neither required nor produced a change in state policy.

Finally, the Farrars' suggestion that Congress in its 1976 enactment of § 1988 intended the same standard for attorneys' fees that is used under the antitrust laws (Pet. Br., pp. 24-25) is refuted by the very antitrust case which they cite. *United States Football League v. National Football League*, 887 F.2d 408, 412 (2d. Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990), upon which petitioners heavily rely (Pet. Br., pp. 24-25), specifically recognized that Congress had mandated the award of attorneys' fees under antitrust laws, while adopting a higher "prevailing party" standard under § 1988.

III. Attorneys' fees are not "costs" under § 1988.

The Farrars' concluding argument, that historically plaintiffs recovering nominal damages could be awarded

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position but merely states that if back pay is awarded attorneys' fees might be appropriate under a private attorney general theory. *See* 501 F.2d at 45. In *Brito v. Zia Co.*, 478 F.2d 1200 (10th Cir. 1973), plaintiff won an injunction in addition to nominal damages. Plaintiff in *Thonen v. Jenkins*, 374 F. Supp. 134 (E.D.N.C. 1974), *aff'd on other grounds*, 517 F.2d 3 (4th Cir. 1975), received small but real compensatory damages of $200. Plaintiff in *Berry v. Macon County Board of Education*, 380 F. Supp. 1244 (M.D. Ala. 1971), achieved reinstatement in addition to nominal damages.

costs and attorneys' fees as "an item of costs," when properly understood,[28] supports the decision of the Fifth Circuit majority. In America, attorneys' fees have never been viewed as simply one more component of traditional costs such as, for example, filing fees; nor, in modern times, have awards of nominal damages usually carried with them an automatic award of costs. Indeed, in its last statutory expression directly in point, Congress provided that plaintiffs recovering less than $500 in most damages actions filed in federal court were not to be allowed costs but were themselves subject to a cost assessment. 28 U.S.C. § 815 (repealed).[29]

The Farrars seem to assert that when in 1976 Congress chose to speak in terms of "costs" and "prevailing parties," it necessarily meant to include those who recovered only nominal damages, since historically it was so uniformly established that nominal damages were "a peg

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[28] The original trial court judgment held that each party should bear his own costs. (Br. Opp. App., pp. 5-6). The Farrars' counsel never perfected an appeal from this part of the original trial court judgment.

[29] This provision was enacted by the First Congress, Act of Sept. 24, 1789, ch. 20, sec. 20, Stat. 83, and remained in the law until 1948, long after the adoption of the Federal Rules of Civil Procedure in 1937. The full text of the statute, at the time of its repeal, stated: "[W]hen, in a district court, a plaintiff in an action at law originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of $500, exclusive of costs, in a case which can not be brought there unless the amount in dispute, exclusive of costs, exceeds said sum or value; or a libellant, upon his own appeal, recovers less than the sum or value of $300, exclusive of costs, he shall not be allowed, but, at the discretion of the court, may be adjudged to pay, costs."

on which to hang costs" that Congress must have had that result in mind when selecting the quoted language. The fact is, however, that the "peg for costs" view, while anciently prevalent, began losing ground about 1670 and had long faded from currency by the time Congress enacted § 1988, so that it could scarcely have represented what Congress had in mind in 1976. *See* Charles T. McCormick, *Handbook on the Law of Damages* § 24 at p. 93 (1935). The dates of the Farrars' authorities cited for this point (Pet. Br., pp. 26-27) tell the tale: *Forrest v. Hanson*, 9 F. Cas. 456 (C.C.D.C. 1802); *Merchant v. Lewis*, 17 F. Cas. 37 (C.C.S.D. Ohio 1857); and J.G. Sutherland, *A Treatise on the Law of Damages* (2d ed. 1883). The sole authority cited from the Twentieth Century is *Hutton & Bourbonnais, Inc. v. Cook*, 92 S.E. 355 (N.C. 1917), and the language put forward from it is an ornamental quotation purely – not a holding – cast in the past tense ("have been described").

Written over half a century ago, Dean McCormick's venerable *Handbook on the Law of Damages*, also relied on by Farrar (Pet. Br., p.26 n.12), notes that even as of that time only about a third of the states retained the "peg for costs" rule and that elsewhere – including federal court, of which more later – quite different rules obtain:

> Many of the statutes are general in their scope and are designed to penalize any plaintiff who sues for debt or damages in the trial court of general jurisdiction, the smallness of whose recovery shows that he should have sued in a justice's court or some other inferior court, by denying him costs. Others are more limited and follow the type of the English "forty shilling" statue by restricting costs where only trivial damages are recovered in actions for such torts

> as libel, slander, and malicious prosecution. Seldom do such special statutes of this latter type touch contract cases. But, all in all, the plaintiff to-day can by no means invariably rely upon a judgment for nominal damages as a "peg" for costs.

McCormick, *supra*, § 24 at 94-95 (footnote omitted).

Thus, it was necessary for the Farrars to consult and cite a work almost sixty years old in order to find and advance any significant support for the "peg for costs" view of nominal damages, and even by then it had become a minority one.[30]

By the same token, the Farrar brief asserts (Pet. Br., p.28) that this Court has repeatedly sustained the recovery of costs by a party who received only nominal damages, supporting the assertion with a string-cite of seven cases; but once more the dates speak volumes: The most recent case cited is *Fairmont Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474 (1933), decided forty-three years before § 1988 was amended to authorize awards of attorneys' fees "as part of the costs."

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[30] The Farrars' brief also cites to and quotes from a footnote in Dean McCormick's work remarking that one "who recovers nominal damages is the 'prevailing party' under modern statutes giving costs to the 'prevailing party.' " McCormick, *supra*, at 93 n.46. Omitted is the fact that the two cases cited in support of the proposition were decided in 1846 and 1909, and, as shown below, that at the time of Dean McCormick's writing in 1935 most plaintiffs in federal court who recovered less than $500 damages could not recover costs but were subject to having costs adjudged against them. 28 U.S.C. § 815 (repealed).

Of more significance, from 1789 until after the time of Dean McCormick's handbook, costs in federal courts were, as noted above, subject to 28 U.S.C. § 815 (repealed). Section 815 provided that a plaintiff shall recover no costs if he "recovers less than the sum or value of $500. . . . " *See* Phillip M. Payne, *Costs in Common Law Actions in the Federal Courts*, 21 Va. L. Rev. 397, 414 (1935). Thus, the last word from Congress on nominal damages as a "peg for costs."

The modern rule with respect to costs is set forth in Fed. R. Civ. P. 54(d):

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Adopted in 1937, this rule did not contemplate the award of costs when a plaintiff received only nominal damages. As the notes of the Advisory Committee on the Federal Rules of Civil Procedure show, it was intended that 28 U.S.C. § 815, which remained in effect until 1948, would be "unaffected by this rule." Thus, the drafters of Rule 54(d) clearly did not contemplate that a plaintiff who received only nominal damages would be a "prevailing party" under that rule.[31]

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[31] While some courts have awarded costs under Rule 54(d) to parties obtaining only nominal damages, *see, e.g.,*

(Continued on following page)

IV. The district court clearly abused its discretion in setting the amount of the fee award.

Because it found that the Farrars were not entitled to *any* award under § 1988, the Fifth Circuit did not reach Hobby's alternative argument that the district court clearly abused its discretion in awarding attorneys' fees in this case. That argument has been preserved by Hobby throughout the case and would require reversal of the district court's fee award even if Petitioners' "prevailing party" argument were accepted.

This Court established the proper analysis for determining the amount of a § 1988 attorneys' fees award in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983): "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." This amount (the "lodestar fee") is appropriate compensation when a plaintiff has obtained "excellent results." *Id.* at 435. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." *Id.* at 440. Thus, where "a plaintiff has achieved only partial or limited success," the lodestar fee "may be an excessive amount." *Id.* at 436. In such cases, "the district court should award only that amount of fees that is reasonable

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Burk v. Unified School Dist. No. 329, Wabaunsee County, 116 F.R.D. 16, 17-18 (D. Kan. 1987); *Western Elec. Co. v. William Sales Co.*, 236 F. Supp. 73, 77 (D.N.C. 1964), none has analyzed the question whether a party recovering only nominal damages is a "prevailing party."

in relation to the results obtained." *Id.* at 440. *Accord Garland*, 489 U.S. at 783 ("[T]he *degree* of the plaintiff's success in relation to the overall goals of the lawsuit is a factor critical to the determination of the size of a reasonable fee. . . . "). In addition, the legislative history of § 1988 reflects that the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), are also relevant. *See Hensley*, 461 U.S. at 429-30.

The district court abused its discretion by failing to apply the above standards in this case. Even if one or both of the Farrars may somehow be characterized as "prevailing parties" under § 1988, the amount of the district court's award is excessive. The degree of the Farrars' "success" relative to the scope of the entire litigation compels a denial of any fees or at least a vast reduction in their amount. Instead, the district court awarded the Farrars the entire amount of their lodestar fee. As is demonstrated below, the district court erred in doing so.

A. The district court erred in awarding fees to both of the Farrars based upon a finding regarding only Joseph Farrar's estate.

Joseph Farrar's estate ultimately became entitled to the entry of a judgment in an amount not to exceed $1.00 in nominal damages based upon the jury's response to special interrogatory number 7. This finding cannot benefit Dale Farrar, however, since it was specific to Joseph Farrar alone.[32] There is nothing in the jury's verdict or in

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[32] The finding does not benefit Joseph Farrar either, since he is deceased.

the Fifth Circuit's holding in the prior appeal on which Dale Farrar can rely to warrant his recovery of attorneys' fees.

The district court, nevertheless, awarded attorneys' fees and expenses to *both* plaintiffs, based upon the work of their mutual counsel, without any apportionment or reduction. Even within the boundaries of the district court's own analysis of "prevailing party" under section 1988, this ruling cannot stand. That is, even if the district court is correct in its premise that the sole finding regarding Joseph Farrar supports an award of attorneys' fees, it does not follow that the same finding supports an award for Dale Farrar. *See, e.g., Albright v. Good Shepherd Hosp.*, 901 F.2d 438 (5th Cir. 1990) (reversing § 1988 award to two plaintiffs against same defendant where one plaintiff's recovery was reversed on appeal).

B. The "results obtained" by the Farrars are insufficient to support the amount of fees awarded.

Among the twelve factors that the district courts must consider in setting an award under § 1988 is "the amount involved and the results obtained." *Johnson*, 488 F.2d at 718. In *Hensley*, this Court held that "the most critical factor is the degree of success obtained." 461 U.S. at 436. In other words, "[t]he *result* is what matters." *Id.* at 435. The district court failed properly to consider this "critical factor" in its analysis. The amount of the fee award is grossly excessive compared to the result the Farrars obtained.

The district judge gave only cursory attention to this factor in his memorandum opinion: "[T]he results

obtained are significant, but possibly less clearly than the Farrars wanted. That will be treated as a neutral factor. The finding of vindication is significant and especially to people who must continue to live and do business in a mostly rural Texas county." (Pet. App., pp.26-27).

At best, the district court's analysis is conclusory. But a "mere conclusory statement" does not satisfy this Court's test. *Hensley,* 461 U.S. at 439 n.15. The trial court's analysis is woefully inadequate because it does not assess the amount the Farrars sought in light of the "results obtained." *See id.* at 440. Instead, the district court dismissed consideration of the amount involved ($17 million) "as lawyer hyperbole." (Pet. App., p.26).

Moreover, the district court failed to consider the gross disparity between the amount of attorneys' fees and the amount Joseph Farrar recovered. But "[w]here recovery of private damages is the purpose of civil rights litigation, a district court in fixing fees, is obligated to give *primary consideration* to the amount of damages awarded as compared to the amount sought." *Rivera,* 477 U.S. at 595 (Powell, J., concurring.) Even the dissenting judge on the panel below would have ordered the district court to reconsider the amount of its large fee, under the circumstances. 941 F.2d at 1317 (Reavley, J., dissenting).

"[I]t would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages." *Rivera,* 477 U.S. at 587 (Burger, C.J., dissenting). Unfortunately, the present case provides a much "better" example: the district court fixed attorneys' fees and costs

at $307,932 (plus interest) for the recovery of a sum not to exceed $1.00 in damages. Although a majority of this Court in *Rivera* rejected the proposition that fee awards must always be proportionate to the amount of damages recovered, the plurality opinion nonetheless held that "[t]he amount of damages a plaintiff recovers is *certainly relevant* to the amount of attorney's fees to be awarded under § 1988." *Id.* at 574.[33] The fees awarded here exceed the damages by a staggering factor of more than *three hundred thousand.* The distinction in *Rivera,* which justified attorneys' fees of seven times the amount of damages, is that the district court expressly found that the plaintiffs' attorneys had obtained "excellent results" for them in the underlying litigation. *Id.* at 572. Here, there was no such finding. The best that the district court could say of the "results obtained" is that this was a "neutral factor." (Pet. App., p.27).

The district courts are not at liberty to pick and choose from among the criteria that this Court has established for setting fee awards under section 1988. The district court in this case clearly abused its discretion in failing to apply these criteria. Given all of the relevant factors, the only appropriate exercise of discretion would be to deny or greatly reduce all fees and costs.

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[33] "Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give *primary consideration* to the amount of damages awarded as compared to the amount sought." *Id.* at 585 (Powell, J., concurring).

CONCLUSION

The judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed, unless the writ of certiorari is dismissed as improvidently granted. Alternatively, this case should be remanded to the Court of Appeals with appropriate instructions for consideration of whether the fee-awarding trial judge properly exercised his discretion, as required by 42 U.S.C. § 1988.

Respectfully submitted,

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